

INTERAGENCY ADVISORY GROUP

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TO: Directors of Personnel
FROM: Clinton Smith *CS*
Executive Vice Chairman
Interagency Advisory Group

*Deadline for comment
to CSC is 17 July 74*
JUL 1 1974

SUBJECT: Draft of Additional Instructions for Implementing the Fair Labor Standards Act (FLSA)

Enclosed is a draft FPM Letter for your review and comment. It specifically addresses the issues of notification to employees and supervisors, compensatory time, fractional hours, night differential payable under title 5 during periods of nonwork, and a clarification of the effect of the maximum earnings limitation, as imposed by 5 U.S.C. 5547, on overtime payable under the FLSA.

We especially wish to bring your attention to the section on fractional hours. Please note that this instruction, as proposed, would be applicable to all employees, not just employees designated nonexempt under the FLSA, as is true with regard to all the other sections of the draft. However, please comment on the alternative of applying the fractional hours concept to just nonexempt employees, for the purpose of overtime.

The proposal to provide for payment of overtime in increments no greater than a quarter hour derives from a number of court cases and practices which have evolved in the private sector over the years. The thrust of the court decisions is that, under the FLSA, all working time is to be paid for, but common sense and judgment should dictate the practicality of determining how little should be paid for, and therefore, insignificant periods that cannot be practically precisely recorded for payroll purposes may be disregarded as "de minimis." You will further note that the draft provides that an agency through its own policy or through negotiations may provide for a smaller increment.

The question of the unit of time for overtime has a relationship to leave charges. We believe that the same unit of time must be used for both purposes because of the effect of paid nonworked time in determining hours of work under the FLSA for the purpose of fixing the point at which a nonexempt employee becomes entitled to overtime under the FLSA. However, we invite your views on this matter, as well as whether or not the Commission should issue any instructions regarding leave charges. In the attached draft we have proposed for consideration the instructions which appear in paragraph 3. Also, please comment on the alternative of applying the fractional hour concept to just nonexempt employees for the purpose of leave charges.

Please have your comments delivered to:

Mr. Seymour Getman, Chief
Pay and Leave Administration Section
Pay Policy Division
Bureau of Policies and Standards
Room 3H30
U. S. Civil Service Commission

by not later than July 17, 1974.

We apologize for the short period of time within which agencies are asked to consider this draft, but we feel it is imperative that information on the Fair Labor Standards Act, and its impact on other matters, be disseminated as quickly as possible.

Attachment

DRAFT

FPM Letter No. 551-

Subject: Additional Instructions for Implementing the Fair Labor
Standards Act (FLSA)

This is another of a series of FPM Letters pertaining to the Fair Labor Standards Act as was mentioned in FPM Letter 551-1, May 15, 1974.

As stated in the FPM Letter No. 551-1, "The FLSA, as amended by Public Law 93-259, does not repeal, amend, or otherwise modify any existing Federal pay laws." This cannot be overemphasized. It means if a non-exempt employee, under the FLSA, is entitled to a greater overtime benefit under the FLSA, the employee must still be paid for other premiums under other appropriate pay laws.

1. Notification to Employees and Supervisors

- a. Initial Notification. All employees shall be notified in writing of their exempt/nonexempt status under the FLSA. At the same time, all supervisors shall be informed of the exempt/nonexempt status of employees under their supervision.
- b. Agencies are required to disseminate information to employees regarding their entitlements under the FLSA. The method by which this is accomplished is for agency determination, but it must be accomplished without delay.
- c. Subsequent Personnel Actions. Agencies will take appropriate action to insure that, as a minimum, the following personnel procedures are implemented:

(1) All position descriptions include a statement in the body of the description as to the exempt or nonexempt status of the position. This may be accomplished by rubber stamp of the words "Exempt" or "Nonexempt."

(2) An identifier be established within the employee's position number to indicate whether an employee is exempt or nonexempt and insure that the position number is recorded in item 20, Standard Form 50, or its equivalent, on all subsequent notifications of personnel actions.

(3) Establish the capability to respond to possible future reporting requirements levied by the Commission and to respond to Commission representatives during compliance review visits concerning the FLSA status of employees. As a minimum, agencies should be able to identify the number of exempt and nonexempt employees by occupational series and grade.

Note: Reviewers of this proposed instruction are requested to comment on the desirability of the Commission establishing a standard identifier or a standard remark for recording the exempt/nonexempt status of employees on the Standard Form 50, or its equivalent.

2. Compensatory Time

a. In FPM Letter No. 551-1, (as amended), Attachment 5, it was stated that compensatory time off for overtime work is probably not appropriate for a nonexempt employee under the FLSA. It was noted, however, that this subject required further study.

b. The FLSA requires that work by nonexempt employees in excess of 40 hours of work in a week shall be compensated for at not less than one and one-half times the employee's regular rate of pay. Section 5543 of title 5, U.S.C., provides for compensatory time off "for an equal amount of time spent in irregular or occasional overtime work...." The practical effect of this statutory conflict is that 5 U.S.C. 5543 does not meet the minimum standard provided by the FLSA. However, compensatory time in certain situations will be permitted provided it is taken off during the same workweek in which the overtime work is performed.

c. Basic requirement for granting compensatory time. Compensatory time, in lieu of overtime pay, for irregular or occasional overtime work, may be granted under one of the following conditions:

- (1) When the employee's overtime entitlement under the FLSA is the same as the overtime entitlement under the pay system for the occupied position; or
- (2) When the employee's overtime entitlement under the pay system for the occupied position (e.g., title 5 premium pay provisions) is greater than the overtime entitlement under the FLSA.

d. Supplementary requirements. All of the following must be met:

- (1) The pay system for the position occupied allows the employee to elect compensatory time as an alternative to overtime pay; and
- (2) The compensatory time must be at the employee's written request; and

(3) The time off must be taken within the same workweek in which the overtime work is performed; and

(4) The time off shall equal the period of overtime credited.

The following examples illustrate the application of the above principles:

Example A:

A GS employee, whose basic pay is less than the minimum rate of GS-10, for whom there are no additives of any kind during the workweek, such as night differential, Sunday differential, hazard pay, etc., and who has had no paid leave during the workweek, will have the same overtime entitlement under both the FLSA and title 5. In this situation, the employee may, upon request, be granted compensatory time off in an amount equal to the period of overtime credited, within the same workweek in which the overtime work is performed.

Example B:

The same GS employee, who, during a workweek, has any paid leave of any kind and also works some overtime, overtime entitlement will be greater under title 5 than under the FLSA. In this situation the employee may, upon request, be granted compensatory time off in an amount equal to the amount of overtime credited within the same workweek in which the overtime work is performed.

f. Compensatory time credited under title 5, or other appropriate statute or regulations, prior to May 1, 1974, but not liquidated prior to May 1, 1974, may still be liquidated under regulations applicable prior to May 1, 1974. However, when the compensatory time off is granted, agencies must assure that employees understand the effect that the time off may have on possible overtime entitlement under the FLSA for that week. This can be best accomplished by having employees sign a statement for the record. This requirement is only applicable to employees designated as nonexempt under the FLSA, effective May 1, 1974. Agencies are urged to have such compensatory time liquidated as quickly as possible so that administrative complexities and recordkeeping problems are kept to a minimum.

3. Fractional Hours for Overtime and Leave Purposes. The FPM Letter No. 551-1, Attachment 5 (as amended) stated, in part, "The employee is entitled to overtime for fractions of hours, as established by agency policy or negotiated agreement."

With regard to nonexempt employees under the FLSA, the courts have ruled, in the private sector over the years, that insignificant periods of time may be disregarded as "de minimis." The resulting practice has been that overtime is paid in fractions of a quarter hour or less. Therefore, in the interest of uniformity and equity, a quarter hour shall be the minimum period for which overtime payment will be made, eight minutes will satisfy

the quarter, and shorter periods will not be accumulated from day to day. However, an agency's policy or negotiated agreement may provide for payment of overtime for fractions less than a quarter hour. This provision shall be applicable to all employees, regardless of their designation under the FLSA.

This provision has a definite relationship to leave charges. Leave shall be charged in quarter hours or multiples thereof, and eight minutes shall be charged as a quarter hour, unless a negotiated agreement provides otherwise.

4. Night Differential Payable During Periods of Leave. Under title 5, a General Schedule employee, who is receiving night differential pay, continues to receive the differential for nonworked holidays, and for periods of annual and sick leave provided the aggregate amount of leave in the bi-weekly pay period is not 8 hours or more. This has no effect on the computation of the regular rate under the FLSA on a weekly basis, since hours not worked, even though paid for, are not counted in determining overtime entitlement under the FLSA, and monies paid for nonworked time are excluded from the computation of the regular rate under the FLSA.

5. Maximum Earnings Limitation under 5 U.S.C. 5547 for General Schedule Employees. As stated in the FPM Letter No. 551-1 (as amended), any overtime paid under the provisions of the FLSA is not subject to the limitation otherwise imposed under 5 U.S.C. 5547. This needs clarifying inasmuch as

the FLSA overtime is computed on a weekly basis, but the earnings limitation under title 5 is applicable to the full biweekly pay period.

The effect of this is that if during either week of a biweekly pay period a nonexempt employee is paid overtime under the FLSA, that overtime is ignored for the purpose of determining whether or not the earnings limitation has been reached. To illustrate, if an employee could be paid no more than \$50 worth of premium pay under the title 5 limitation in a biweekly pay period, but for one of the weeks, or even both weeks, is paid overtime under the FLSA, the employee could still be paid the full \$50 for other premium pay under title 5.